

1 I. NEEL CHATTERJEE (State Bar No. 173985)
nchatterjee@orrick.com
2 JULIO C. AVALOS (STATE BAR NO. 255350)
javalos@orrick.com
3 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
4 Menlo Park, CA 94025
Telephone: 650-614-7400
5 Facsimile: 650-614-7401

6 THOMAS J. GRAY (STATE BAR NO. 191411)
tgray@orrick.com
7 ORRICK, HERRINGTON & SUTCLIFFE LLP
4 Park Plaza
8 Suite 1600
Irvine, CA 92614-2558
9 Telephone: +1-949-567-6700
Facsimile: 949-567 6710

10 Attorneys for Plaintiff
11 FACEBOOK, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 FACEBOOK, INC.,

17 Plaintiff,

18 v.

19 STUDIVZ LTD., HOLTZBRINCK
20 NETWORKS GmbH, HOLTZBRINCK
VENTURES GmbH AND DOES 1-25,

21 Defendants.
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Case No. 5:08-cv-03468 JF

**DECLARATION OF THOMAS J.
GRAY IN SUPPORT OF FACEBOOK,
INC.'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SANCTION**

Date: March 3, 2009
Time: 10:00 a.m.
Room: Courtroom 2, 5th Floor
Judge: Honorable Magistrate Judge
Howard R. Lloyd,
for Discovery Purposes

1 I, Thomas J. Gray, declare as follows:

2 1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, counsel
3 for Plaintiff Facebook, Inc. I make this Declaration in support of Facebook's Opposition to
4 Defendants' Motion For Sanctions. I am an active member in good standing of the California
5 State Bar. Except as set forth herein, I have personal knowledge of the facts stated herein and if
6 called as a witness, could and would competently testify thereto.

7 2. On December 30, 2008, I participated in a meet and confer session with William
8 Walker, Defendants' counsel. On December 31, 2008 I emailed Mr. Smith and Mr. Walker to
9 discuss a number of concerns. With respect to the upcoming depositions, I stated: "In addition,
10 yesterday Bill advised that Messrs Brehm and Weber were being offered as "personal
11 jurisdiction" witnesses. We need to clarify if these witnesses are also being offered to testify as
12 company witnesses regarding the topics set forth in Facebook's 30(b)(6) deposition notices that
13 were served on Defendants in October. If not, we need to iron out what Messrs. Brehm and
14 Weber will be prepared to testify about on Jan 12 and 13 - beyond the statements made in their
15 declarations. Also, if not Messrs. Brehm and Weber, will SVZ offer other witnesses to testify on
16 Jan 14 and/or 15 regarding the topics set forth in the 30(b)(6) notice? Obviously, we want to
17 make the trip to Germany as productive as possible for all concerned."

18 3. Upon the conclusion of the January 6, 2009 meet and confer session with
19 Defendants' counsel, Mr. Smith and Mr. Walker, I believed that the parties had reached an
20 agreement as to the scope of the deposition testimony of Messrs. Brehm and Weber.
21 Accordingly, on January 6 and 7, 2009, I spent approximately 10 hours preparing for the
22 depositions, which result in fees of approximately \$6,000 being billed to Facebook. Fees that
23 could have been avoided had Mr. Smith informed me that he did not believe an agreement had
24 been reached regarding the depositions.

25 4. I was truly surprised when Mr. Smith emailed me on January 7, 2009 that the
26 parties had not reached an agreement during the January 6, 2009 meet and confer session. After
27 receiving Mr. Smith's email, later on January 7th, I responded, stating that I was surprised by Mr.
28 Smith's message and that he "truly thought we made some progress yesterday and that it made

1 sense to go forward with the depositions. We had lengthy discussions about the Weber and Brehm
2 depositions and even discussed questions that you thought were ok. As to Weber, you seemed
3 comfortable with all questions related to access (presumably bc he doesn't know anything about
4 what StudiVZ did). You never stated that the deposition testimony was contingent on working out an
5 agreement as to all discovery, including document requests and requests. Anyway, if that is your position
6 now, it is news to me." I concluded by stating that "it does not look good for the depositions
7 going forward based on your newly asserted position, we should talk tomorrow morning to see if
8 we can salvage this."

9 5. On January 8, 2009, Mr. Smith responded, "I just landed in Germany and am on
10 my way to the hotel. I did not sleep well (i.e. at all) on the plane and want to go to bed. I told you
11 that I was flying out Wednesday evening. Why can't this wait until tomorrow?" Only once I
12 received this email did I realize that Mr. Smith had flown to Germany. I responded "I am sorry
13 you did not sleep well on the plane, but at this point it is already Thurs. and we need to resolve
14 this (if possible) ASAP so we all know whether these depositions are going forward Mon and Tues. At
15 this point it doesn't look good based on your email last night. I don't think we can wait until
16 tomorrow. If you want to talk later after you have had a chance to rest, let me know."

17 6. While Facebook remained willing to go forward with the depositions, Mr. Smith
18 never called. Rather, he took the time to write a multi-page email disagreeing with Facebook's
19 version of agreements made as to the scope of the depositions and threatening sanctions against
20 Facebook for costs and fees incurred in flying to Germany. He then apparently went to bed. In
21 light of Mr. Smith's refusal to meet and confer further about the depositions, that same day,
22 January 8, 2009, I confirmed that Facebook counsel would not be flying out to Germany for the
23 January 12 and 13 depositions. Defendants were clearly not going to change their position, that
24 "no questions about access" would be allowed. I needed to cancel the depositions at that point or
25 incur thousands of dollars of charges for the court reporter and videographer.

26 7. I have reviewed the Declaration of Julio C. Avalos filed in support of Facebook's
27 Opposition to Defendants' Motion for Sanctions. Mr. Avalos's descriptions of the meet and
28 confer sessions and emails in which I participated seem accurate based on my recollection and

1 contemporaneous notes.

2 I declare, under penalty of perjury, that the foregoing is true and correct to the best of my
3 knowledge.

4 Executed this 10th day of February 2009, at Irvine, California.

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6 /s/ Thomas J. Gray
7 Thomas J. Gray
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that this document(s) filed through the ECF system will be sent
3 electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)
4 and paper copies will be sent to those indicated as non registered participants on February 10,
5 2009.

6 Dated: February 10, 2009

Respectfully submitted,

7 /s/ Thomas J. Gray

8 Thomas J. Gray

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